IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 1974 OF 2006
IN
NOTICE OF MOTION NO. 320 OF 2006
IN
SUMMARY SUIT NO. 23 OF 2006

Nitin Kumar Didwania .. Plaintiff.

V/s.

1. M/s.Transgene Biotek Ltd. & Anr. .. Defendants.

ALONG WITH

NOTICE OF MOTION NO. 320 OF 2006
IN
SUMMARY SUIT NO. 23 OF 2006

Nitin Kumar Didwania .. Plaintiff.

V/s.

1. M/s.Transgene Biotek Ltd. & Anr. .. Defendants.

Mr.Chirag Balsara with Mr. Vivek Kantawala i/by M/s. Vivek Kantawala & Co. for the Plaintiff in both motion.

Mr.Pratik Sakseria with Mr.S.Purohit i/by M/s.Nankani & Associates for the Defendants Nos. 1 & 2 in both motion.

CORAM : S. A. BOBDE, J.

DATED : 05th FEBRUARY, 2007.

P.C.:

. In Notice of motion No.320 of 2006, on 7th

February, 2006 this court granted an injunction order, restraining the defendant No.2 from selling, transferring, encumbering or creating any right, title and/or interest in respect of 1,50,000/- shares of defendant No.2 in the defendant No.1 company. The plaintiffs seek confirmation of this order.

2. By the notice of Motion No.1974 of 2006, the defendant No.1 company seeks vacation of the aforesaid interim order dated 7th February, 2006.

3. In the suit, the plaintiffs have claimed a decree in the sum of Rs.11,11,98,779/- on the basis of loan given to the defendants in the sum of Rs.25,00,000/- at the rate of 36% per annum simple interest.

4. Admittedly, the claim is made by the plaintiffs in the suit on the basis of the compound interest on the loan and on the basis of the clause 1.2 of the loan agreement, allegedly allowing the plaintiffs an additional interest at the rate of 6% per month for default in payment. It is clear from the loan agreement on the basis of which the suit is based that there is no agreement for payment of compound interest vide clause 1.2. Prima facie, the suit claim appears to be

excessive. The present prayer made by the plaintiffs is for the attachment before judgement or for an injunction based on the sum of 1,50, 000/- shares out of which, admittedly, 50 shares are belonged to the defendant No.2 in the defendant No.1 company. The said shares were pledged to the plaintiffs in pursuance of clause 2.1 of the loan agreement at Exh.'A'. Further the plaintiffs, admittedly, hold about 44,700/- shares, which belong to defendant No.2 in the defendant No.1 company.

5. The dispute is whether the liability of the defendants has been modified in any way by the memorandum of settlement dated 31st January, 2004 at Exh.'C'. Apparently, under this memorandum of settlement, the defendants agreed to make payment of Rs.6,32,000/- vide clause 2 and Rs.38,00,000/- vide clause 3. The latter amount was to be paid in about 18 instalments. Under this memorandum of settlement, the plaintiffs have acknowledged that they hold 44,700/- equity shares of the defendant No.1, which are to be returned after payment of the 18th instalments. It is, therefore, obvious that under this agreement, the liability is substantially reduced. However, it is contended on behalf of the plaintiffs that the defendants have breached the agreement by not paying beyond 5th instalment and, therefore, the memorandum of

settlement is extinguished and the original condition in the principal agreement dated 1st September, 1995 shall stand reinstated. However, according to the defendants, the non- payment of the amount beyond 5th instalment was due to the acts of the plaintiffs. It is not necessary to decide, who has caused the breach. It appears sufficient for the purpose of this application that the liability of the defendants appears to have been reduced and the parties have agreed to it. It is equally important to note that the plaintiffs are deemed to be secured to the extent that they hold 44,700/- equity shares as pledged in security to them. The plaintiffs are thus not without any security for their claim.

6. The learned counsel for the plaintiffs further submitted that the amount payable by the defendants as per the suit claim is a sum of Rs.11,11,98,779/- and the security of about 44,700/-shares held by the plaintiffs is not sufficient to secure the claim of the plaintiffs. It may be noted that, prima facie, the claim of Rs.11,11,00,000/- approximately is not tenable as the amount actually advanced is Rs.25 lakhs at the rate of 36% per annum simple interest and 6% per month additional interest.

7. At this stage it, it would be inappropriate to quantify the amount or the liability of the defendants. But suffice it to say that the plaintiffs' claim of about Rs. 11 crores is exaggerated. According to the learned counsel for the defendants, without admitting, taking principal amount of Rs.25 lakhs and 36% interest per annum on the said amount, the liability of the defendants comes to about Rs.90 lakhs and if the payments made by the defendants are adjusted, the defendants liability is in the region of Rs.50 lakhs.

8. Having regard to the over all circumstances of the case and particularly, the fact that the plaintiffs, admittedly, hold 44,700 equity shares as security and the value of said shares is about 45 lakhs, it is clear that the plaintiffs are not without any security.

9. The learned counsel for the plaintiffs strongly urged that there should be an attachment before judgment or at least an injunction because according, to the plaintiffs they have learnt on the basis of the letter written to them by one investor that the defendants are looking for some delay with all the shares held by them and, therefore, the only inference possible that the defendants are intending to dispose of the shares in order to defeat the plaintiffs claim. In my opinion,

the mere assertion that the defendants are attempting to sell all the shares with a view to defeat or delay the execution of the decree is not sufficient. Indeed that was the view of the division bench of this court in the case of **Saraswat Co-operative Bank Ltd., vs. Chandrakant Maganlal Shah , 2002 (1) Mh.L.J. 581.** The division bench observed in paragraph 24 as follows :

> "24. As to the application of the Order 38 of the Civil Procedure Code under which an order for attachment of property could be made before judgment, we find no such circumstances existed. In fact, we questioned Dr. Naik to satisfy us even now as to how the land and premises could have been attached before judgment by an order made under Order 38 of the Civil Procedure Code or its equivalent under the Maharashtra Co-operative Societies Act, 1960. Dr.Naik invited our attention to the application for interim relief made to the Co-operative Court. This application sought three interim reliefs: (i) attachment before judgment; (ii) appointment of Receiver in respect of movable and immovable assets, and (iii) injunction. Apart from a bald averment in paragraph 4 that the Company was likely to transfer and/or encumber and/or part with possession of the movable as also immovable assets consisting of factory and other immovable assets with a view to defeating and/or delaying and/or obstructing the execution of any award or carrying out of any order that will be passed, no circumstance indicating as to how such an apprehension arose was mentioned in the application or the order of the Co-operative Court. In our view, an order of attachment before judgment has serious consequences to a debtor. It is not an order to be made lightly nor based on bald averments reiterating the statutory provisions. There has to be some prima facie material on the basis of which the Court could satisfy itself that the conditions requisite for making an order of

> attachment before judgment enumerated in Order 38 of the Civil Procedure Code exist. Otherwise, every Plaintiff would rush in with a bald averment like the one made by the Bank and obtain an attachment before judgment".

10. In the circumstances, I am of view that the plaintiffs have not made out a prima facie case for granting either a judgment before attachment or for an injunction, restraining the defendants from selling, transferring, encumbering or creating any right, title and /or interest in respect of 1,50,000/- shares, which were also pledged to the plaintiffs.

11. Hence, there is no merit in the notice of motion No.320 of 2006, which is hereby dismissed.

12. The Notice of Motion No. 1974 of 2006 taken out by the defendants for vacation of the order dated 7th February, 2006 is allowed.

13. The learned counsel for the plaintiffs applied for stay of this order. There is no merit in the prayer and the application for stay is rejected.

(S.A.BOBDE,J.)

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